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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN LEE HARRIS,

Defendant and Appellant.

F056282

(Super. Ct. No. CRF6222)

OPINION

APPEAL from a judgment of the Superior Court of Mariposa County. F. Dana Walton, Judge.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

After he pled no contest to two felony charges, Bryan Lee Harris sought to withdraw his plea on the ground of involuntariness. The court denied relief and imposed

sentence pursuant to his plea agreement. On appeal, he argues that the court's ruling was prejudicial error. We affirm.

BACKGROUND

On May 18, 2007, the district attorney filed a complaint charging two counts of criminal threats (Pen. Code, § 422)[1] and one count of annoying telephone calls (§ 653m, subd. (a)) against Raina Tippets on April 9, 2007.[2] On June 18, 2007, the date of his arraignment, the court remanded him to custody on $50,000 bail and issued a protective order restraining him, inter alia, from having any contact with Raina except through an attorney of record.

On June 26, 2007, Bryan made, and the court denied, a request for release on his own recognizance to seek orthopedic attention for a fractured clavicle which was operated on two weeks earlier. After the court's receipt of a request from the sheriff's office that his orthopedist address the complications of his surgery, however, the court, on its own motion, calendared an inquiry into his medical status for June 28, 2007, but his attorney was not available on that date, so the court continued the inquiry to July 2, 2007.

On July 2, 2007, the court reviewed Bryan's medical status and, with no objection by the prosecutor, released him on his own recognizance. "In the interest of justice we're going to agree to his release now because he has got some real issues with an arm that he just had surgery on," the prosecutor stated.

At the same hearing, Bryan pled no contest as charged on the conditions, inter alia, of (1) an aggregate sentence of three years and eight months (the aggravated three-year

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[1] Later statutory references are to the Penal Code except where otherwise noted.

[2] On May 10, 2007, Tippets, who was Harris's former cohabitant and the mother of his son, married him and took his name. For brevity and clarity, not from disrespect, later references to the Harrises will be by first names only.

term on one criminal threat and a consecutive eight-month term on the other) with a stay of execution, (2) dismissal of the misdemeanor (an alternative to one of the felonies), and (3) a grant of five years of felony probation with 60 days in county jail and with time not yet served satisfied by participation in a treatment program.

Additional conditions of Bryan's plea were, inter alia, (4) a waiver of his "right to appeal any claims arising before the plea, including [his] right to appeal the denial of any and all motions made and denied," (5) a waiver of his "right to appeal from any claims arising during sentencing," (6) a waiver of his "right to appeal from any sentence the court imposes" pursuant to his plea agreement, (7) a *Blakely/Cunningham*[3] waiver of his rights to trial by jury, confrontation, and cross-examination and of his privilege against self-incrimination with reference to any fact in aggravation the court might use to impose the aggravated term, (8) a stipulation to the imposition of the aggravated term pursuant to his plea agreement, and (9) a waiver of time for sentencing to August 7, 2007. Finally, the court issued a protective order restraining him from, inter alia, annoying, harassing, or striking Raina.

On July 17, 2007, Bryan filed a substitution of attorney. On July 31, 2007, a week before sentencing, he argued with Raina, hit her in the face, and drove his car in a way that required her to take evasive action to avoid injury to her and the child in her arms.[4]

On August 7, 2007, Bryan appeared in custody not only for sentencing, which the court continued on the request of his new attorney to allow time to prepare a motion to withdraw the plea, but also for continued arraignment in the domestic violence case. The complaint in that case charged him with, inter alia, three felonies – child endangerment

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[3] *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) 549 U.S. 270.

[4] The child was Bryan's and Raina's. Later references to the charges arising out of his conduct on that date are to "the domestic violence case."

(§ 273a, subd. (a)), infliction of corporal injury on a spouse with two priors (§ 273.5, subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)(1)) – and three misdemeanors – driving under the influence with three priors (Veh. Code, § 23152, subd. (a)), driving with 0.08 percent or more of blood alcohol with three priors (Veh. Code, § 23152, subd. (b)), and willful disobedience of a protective order (§ 273.6, subd. (a)).

On October 12, 2007, Bryan filed a motion to withdraw the plea. On November 1, 2007, the prosecutor filed an opposition to the motion. On November 13, 2007, Bryan filed a reply to the opposition. After hearing argument on December 10, 2007, the court denied the motion on January 3, 2008.

On March 18, 2008, Bryan filed a motion for reconsideration on the ground that, due to a calendaring error by his attorney, the judge who presided at his arraignment, not the judge who presided at all the other proceedings, had heard the motion to withdraw the plea. On April 29, 2008, the latter judge denied the motion for reconsideration.

On June 10, 2008, Bryan filed a motion for reconsideration on the ground of ineffective assistance of counsel by his former attorney. On July 3, 2008, the prosecutor filed an opposition to the motion. On July 23, 2008, the court denied the motion.

On July 31, 2008, Bryan pled no contest in the domestic violence case to child endangerment (§ 273a, subd. (a)) and infliction of corporal injury on a spouse (§ 273.5, subd. (a)) on the conditions, inter alia, of an aggregate sentence of four years (the four-year middle term for child endangerment concurrently with the four-year middle term for intentional infliction of corporal injury on a spouse) concurrently with a sentence of three years and eight months in the criminal threats case (an aggravated three-year term for one criminal threat consecutive to an eight-month term for the other). On September 30, 2008, the court imposed sentence pursuant to the plea agreement of July 31, 2008.

DISCUSSION

Bryan's involuntariness argument has two components. First, he argues that the court improperly "induced" his plea by proposing that "he and his attorney should 'reach

some type of agreement' with the prosecution" so that he could "get out of jail to obtain critical medical treatment the jail could not provide."

Lamentably, Bryan quotes the court's words "reach some type of agreement" entirely out of context. In the Attorney General's words, he "grossly distorts the record." As the following summary of the record will show, we agree.

On Tuesday, June 26, 2007, the sheriff's office sent a letter informing the court that Bryan was suffering "complications" that "should be addressed by his surgeon" in Hanford about the surgical repair of his fractured clavicle shortly before he went into custody. The letter expressed concern about the "care of the patient" and the "financial burden to Mariposa County."

On Wednesday, June 27, 2007, a medical status inquiry was calendared, on the court's own motion, for Thursday, June 28, 2007. At the hearing, the court repeatedly tried without success to contact Bryan's attorney but finally learned that her office was closed for the day. "I'm sorry you had to sit through all this," the court told Bryan. "I know you're in pain. I recognize that. We're going to have to set the matter out until Monday morning," the court added, "whenever she's going to be here." The court emphasized, "I want you also to understand that the Court will try to get a hold of her tomorrow and try to get in consultation with her and the District Attorney and the jail, and see if there's anything that can be agreed upon before Monday. We'll give it a try, okay?" The following colloquy ensued (italics added):

> "THE DEFENDANT: Okay. I was under the assumption that she would be back Friday.
>
> "THE COURT: Yeah. Well, I will tell you that I won't have – I will not have a court reporter on Friday, okay?
>
> "THE DEFENDANT: Okay.
>
> "THE COURT: But we can – if everybody can *reach some type of agreement*, we can do it without – without a court – without a –

"THE DEFENDANT: Okay.

"THE COURT: – court reporter, okay?

"THE DEFENDANT: Okay."

Entry of a felony plea is impermissible without a court reporter, of course. The agreement that the court suggested – to allow Bryan to consult the surgeon in Hanford who operated on him – is not. Yet the words that are the centerpiece of his argument arose at the medical status inquiry at which the *sole* issue was the possibility of reaching an agreement for medical care on the following day, when a court reporter was not going to be available. In short, the record belies his claim.

The second component of Bryan's involuntariness argument is his assertion that his no-contest plea "was the only way to be released to obtain desperately needed medical treatment." He elaborates: "While painful to admit, here [he] suffered coercion akin to torture, restrained in jail for more than two weeks suffering painful complications from a complex surgery the jail was incapable of treating without even regular access to over the counter pain medication."

The record, on the other hand, shows that on the day after the sheriff's office notified the court of Bryan's post-surgical complication the court calendared a medical status inquiry for the next day. Despite the court's persistent attempts to locate his attorney on that day, she was nowhere to be found. The record is silent for the following day, when a court reporter was not available.

On the next court day, Monday, July 2, 2007, the prosecutor agreed to Bryan's release on his own recognizance to secure medical care. At the same hearing, he entered into a plea agreement that made no reference to his release. Likewise, the reporter's transcript of the hearing shows no nexus between his release and his plea agreement.

As the court's findings of fact at the hearing on Bryan's motion to withdraw his plea show, despite the injury and the pain that were evident every time he was in court "he was entirely engaged" and knew "what he was doing at the time of the entry of the

plea." He was "sufficiently advised of his rights and the consequences of his plea" and simply "changed his mind." In the absence of a showing that "he was in any way prevented from exercising his free judgment and entering this plea on that day," the court denied the motion.

Only conjecture and hyperbole support Bryan's argument of "coercion akin to torture." The record surely does not. The Attorney General argues that his "convoluted argument is designed to obtain de novo review." Perhaps so. The grant or denial of a motion to withdraw a plea rests in the sound discretion of the court, however, so we can disturb the court's ruling only on a showing of a clear abuse of discretion. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) Our duty is to accept all of the findings of fact supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) By the governing standard of review, Bryan fails to make the requisite showing.

DISPOSITION

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

_____
Cornell, Acting P.J.

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Hill, J.